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In the Supreme Court of the United States

October Term, 1981

TILDEN R. WILKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HOWARD I. LEGUM
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510
(804) 622-6383
Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

TILDEN R. WILKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Tilden R. Wilkinson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, A1-A42) is reported at 677 F.2d 998. The opinion of the district court (App. B, infra, A43-A61) is reported at 523 F.Supp. 217).

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HOWARD I. LEGUM
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510
(804)622-6383

QUESTIONS PRESENTED

1. Whether petitioner's claim accrued within the meaning of 28 U.S.C. §2401(b) when he was injured or when he became aware that the government employee was acting within the scope of his employment.

2. Whether petitioner's claim accrued within the meaning of 28 U.S.C. §2401(b) when he or his attorney knew, or in the exercise of reasonable care should have known, that his injury was caused by a government employee acting within the scope of his employment.

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Constitution, statutes, and regulation:

28 U.S.C. §2401(b) 2,3,6 15,16

28 U.S.C. §1254(1) 6

28 U.S.C. §2679(b) 13

JURISDICTION

The judgment of the court of appeals (App. C, infra, A-62) was entered on April 27, 1982. No petition for rehearing was filed. The jurisdiction in this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §2401(b), provided:

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

STATEMENT

Petitioner was injured about 10:00 p.m. on October 3, 1978, in the City of Virginia Beach, Virginia,

when a rental automobile operated by Richard Evans Gray struck him. His attorney filed an action in the Circuit Court of the City of Virginia Beach, Virginia, on September 17, 1980, after unsuccessful attempts to settle with the insurance carrier for the rental car that Gray was operating. In a pleading filed October 10, 1980, Gray's attorney asserted that Gray was a government employee acting within the scope of his employment. On October 20, 1980, Wilkinson's attorney mailed an administrative claim to the United States Navy, which was filed on October 24, 1980. It appeared after approximately four months of discovery in the state court on the question of scope of employment the Navy claims attorney investigated the circumstances to determine whether Gray had been acting within

the scope of his employment at the time of the accident.

The United States Attorney removed the case from the state court to the federal court and moved for dismissal on the ground that petitioner had failed to file an administrative claim, a jurisdictional prerequisite to suit, and the statute of limitations had expired. The district court subsequently dismissed the action because petitioner had not filed an administrative claim within two years from date of injury.

Although petitioner knew of the existence of the injury on the night he was struck, the evidence is without dispute that he did not then know the critical fact that his injury was caused by a government employee acting within the scope of his employment. When petitioner consulted his attorney on October

9, 1978, Gray had left Virginia without disclosing to the local Naval Claims Officer that he had been involved in an accident. His attorney wrote the rental car agency which had furnished the car Gray was driving on October 16, 1978, but he received no reply until the following December. Not until after suit was filed did Gray reveal to petitioner and his attorney that he was acting within the scope of his government employment.

REASONS FOR GRANTING THE PETITION

1. The result reached by the district court and the court of appeals is unjust, inequitable and contrary to congressional intent.

2. Petitioner's case, if it had originated in the Second and Tenth Circuits, would not have been dismissed.

In Kelley v. United States, 568 F.2d 259 (2d Cir. 1978), the court held that when a claimant institutes suit against a government employee in the state court within the time limited by state law, it is unnecessary to determine whether the action accrued at a date later than the accident. Timely institution to suit in a state court precludes dismissal even though the administrative claim is filed more than two years after the accident. 568 F.2d at 262-268. See also Henderson v. United States, 429 F.2d 588 (10th Cir. 1970). Kelly and Henderson reached the proper result on the basis of logical reasoning that is consistent with the legislative history.

3. Petitioner's case, it appears, would not be dismissed in the Seventh Circuit. See McGowan v. Williams, 623

F.2d 1239 (7th Cir. 1980), which approved Whistler v. United States, 252 F. Supp. 913 (N.D. Ind. 1966). This opinion cautions that Steele v. United States, 599 F.2d 823 (7th Cir. 1979), on which the district court in the Wilkinson case relied, does not pertain to actions governed by the Driver's Act. See 623 F.2d 1243.

4. Harris v. Berris Chemical, Inc., 490 F. Supp. 968 (N.D. Ga. 1980) held that nothing in the record indicated that prior to filing her state court action, the plaintiff knew or should have known of the federal aspect of the case and overruled the motion of the government to dismiss the claim.

5. Wollman v. Gross, 637 F.2d 544 550-55 (8th Cir. 1980) (Adams, J. dissenting; 646 F.2d 1306 1981) (Lay, Bright, McMillian and Arnold, J. J.,

dissenting from denial of rehearing en banc, pointed out the inequity of the majority opinion upholding the district court.

6. United States v. Kubrick, 444 U.S. 111 (1979) provides adequate, authoritative precedent for a reversal of the court of appeals and reinstatement of petitioner's action. Kubrick was decided three years after Miller v. United States, 418 F. Supp. 373 (D. Minn. 1976) which is the single authority cited in the majority opinion in the Wilkinson case in opposition to the concept of "accrual" that Kubrick explains. The Miller opinion, lacking the benefit of Kubrick, should not be considered as sound precedent. As in Kubrick, the issue of accrual of Wilkinson's claim presents a mixed question of law and fact. The adminis-

trative notice claim was only 21 days beyond the two year period. The district court did not find that petitioner or his attorney knew, or should have known, within 21 days after the accident that Gray, driver of the rental automobile after normal working hours, was acting within the scope of his authority. It took several months before the Naval Claims Attorney after October 24, 1980, when he began his investigation to determine that Gray was acting within the scope of his employment at the time of the accident. Wilkinson's administrative claim was timely.

7. 28 U.S.C. §2679(b) states that the Federal Tort Claims Act shall be the exclusive remedy for injury resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office

10:00 on the night of the accident took several months. Its investigation was not prolonged because the administrative claim was filed within two years and 21 days rather than two years. The Driver's Act, while it confers a cause of action against the government in an appropriate case, also grants immunity to the government employee who is engaged in the government's business.

8. The analysis in Kubrick of the concept of accrual in §2401(b) is pertinent to the Driver's Act. The court accepted as the time of accrual the date plaintiff possesses "the critical facts that he has been hurt and who has inflicted the injury". The second critical fact, "who has inflicted the injury", has two elements: (1) the name of the person and (2) his identity as a government employee acting within the

scope of his employment. Until the plaintiff has had a reasonable opportunity to ascertain this critical fact, he cannot determine whether it was a claim against an individual or the government.

9. The claim against the government should not accrue until the claimant in the exercise of reasonable diligence has an opportunity to ascertain whether he can establish the essential element of a cause of action under the Tort Claims Act whether the injury was caused by an employee acting within the scope of his employment. The holding of the district court that the claim accrued on the date of injury is contrary to the plain language of §2401(b) and the sensible construction of this section accepted in Kubrick.

10. The decision of the district court should not be accepted because it

held that a claim against the government accrues before even a diligent claimant learns the critical fact that the driver who injured him was given a cause for such a claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD I. LEGUM
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510

Counsel for Petitioner

CERTIFICATE

I hereby certify that I have served three copies of this Petition for a Writ of Certiorari to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the United States Mail, with first-class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 14th day of July, 1982.

HOWARD I. LEGUM,
Of Counsel for
Petitioner